Supreme Court, U.S.
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No. 98-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LAURA DAVIS,

Petitioner,

v.

WACHOVIA MORTGAGE COMPANY f/k/a FIRST WACHOVIA MORTGAGE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether both the Eleventh Circuit Court of Appeals and the United States District Court for the Northern District of Georgia abused their discretion by not vacating the dismissal of Petitioner's case when dismissal was granted because Petitioner willfully failed to comply with the Local Rules for the Northern District of Georgia.

SUPREME COURT RULE 29.6
CORPORATE LISTING

Respondent has the following parent company: Wachovia Corporation.

Respondent does not have any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This action stems from the purchase of a home by Petitioner Laura Davis ("Petitioner") from Respondent Wachovia Mortgage Company ("Respondent"). Litigation has been pending between the parties since 1992. In 1996, on the eve of trial, Petitioner voluntarily dismissed her initial complaint, which was filed in the Superior Court of Fulton County, Georgia. Petitioner subsequently re-filed the instant action in the same court on April 23, 1997. Respondent removed this case to federal court on May 22, 1997.

After removal, Petitioner consistently failed to comply with the Local Rules for the Northern District of Georgia ("Local Rules").[1]

Petitioner failed to file her mandatory disclosures, violating LR 26.1, NDGa. Petitioner failed to file or to cooperate with Respondent in filing a certificate of interested persons, violating LR 3.3, NDGa. Respondent's counsel initiated discussions with Petitioner and sent her a proposed certificate on June 6, 1997. The certificate needed only to be proofed and signed. Petitioner did not authorize Respondent to file the certificate on her behalf.

Petitioner failed to initiate or to participate in an early planning conference with Respondent, violating LR 16.1, NDGa. Scheduling this conference was the Petitioner's responsibility, but Petitioner never even contacted Respondent to set a date. *Id.* Nevertheless, Respondent attempted to plan the conference and sent a letter to

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1. Respondent will hereinafter refer to the specific Local Rule by the citation form "LR __, NDGa."

Petitioner's counsel addressing these scheduling issues. Petitioner never responded to the letter.

Petitioner failed to participate in preparing the joint preliminary planning report and scheduling order, violating LR 16.2, NDGa. Again, Respondent's counsel attempted to confer with Petitioner in order to timely file this report. Petitioner failed to respond. As a result, Respondent was forced to unilaterally prepare and submit its version of the preliminary planning report and scheduling order, which was signed and made the Order of the district court.

Respondent filed a motion to dismiss on August 26, 1997 based on Petitioner's repeated failure to follow the Local Rules. Petitioner failed to respond. LR 7.1(B), NDGa ("Failure to file a response shall indicate that there is no opposition to a motion").

All of the above filings and Orders were served on Petitioner.

On September 18, 1997, Judge Frank M. Hull of the United States District Court for the Northern District of Georgia granted Respondent's unopposed motion to dismiss. In the district court's order, Judge Hull specifically held that Petitioner "wilfully has failed to comply with the Local Rules of this Court regarding pretrial proceedings." (Appendix C at 6a.)

On September 29, 1997, Petitioner filed a motion to reconsider the order and judgment and/or in the alternative motion to vacate the judgment and order. During this interim, the case was transferred to Judge Robert L. Vining. On October 27, 1997, Judge Vining denied Petitioner's motion

for reconsideration, holding that Petitioner's post-dismissal willingness to comply with the Local Rules was "untimely." Judge Vining further held that Petitioner's "unfamiliarity" with the time requirements for responding to motions did not constitute "excusable neglect."[2] (Appendix B at 5a.)

On November 21, 1997, Petitioner appealed to the Eleventh Circuit Court of Appeals, seeking review of the "Final Order of the United States District Court denying Appellant's Motion for Reconsideration and/or Motion to Vacate and Appellant's Motion to Leave to File." Petitioner did not file an appeal seeking direct review of the original order of dismissal.

On September 24, 1998, the Eleventh Circuit affirmed the district court's refusal to vacate the dismissal. The Eleventh Circuit noted that the Petitioner only appealed "the district court's refusal to grant her motion for reconsideration, not the district court order dismissing the case with prejudice." As a result of Petitioner's repeated failure to follow the Local Rules, the Eleventh Circuit stated that although the sanction of dismissal is a "sanction of last resort," it "[could not] say that the district court abused its discretion in denying the motion for reconsideration." (Appendix A at 2a-3a.)

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2. Contrary to Petitioner's claim that Respondent's response brief was "late" (Petition for Writ of Certiorari at 4), Respondents' response to Petitioner's motion for reconsideration was filed in a timely manner. *See* Fed. R. Civ. P. 6(a) and Local Rule 6.1(A), NDGa.

REASONS FOR DENYING THE WRIT

Petitioner does not suggest any split between the Circuits on the issues presented in her Petition, she does not request that the Supreme Court resolve an important question of federal statutory law, nor has she shown that the underlying decision conflicts with Supreme Court precedent. Rather, Petitioner requests that this Court hold that both the district court and appellate court abused their discretion by failing to vacate the discretionary dismissal of Petitioner's case. This is not a proper case for Supreme Court review. *See* Sup. Ct. R. 10.

Petitioner's main argument is that the district court should have specifically listed why "lesser sanctions would not [have] suffice[d]." (Petition for Writ of Certiorari at 8, *citing World Thrust Films, Inc. v. International Family Entertainment, Inc.*, 41 F.3d 1454 (11th Cir. 1995).) Petitioner argues that as a result of this purported omission, the Eleventh Circuit abused its discretion and misapplied its own case law by affirming the district court. This argument fails procedurally and substantively.

First, this argument is not properly before the Court. Petitioner did not raise this argument in her initial motion for reconsideration to the district court or in her opening brief to the Eleventh Circuit. Rather, this argument first appeared in Petitioner's reply brief to the Eleventh Circuit. Therefore, Petitioner's argument on this point was, and is, waived and should not be considered. *United States v. Kimmons*, 1 F.3d 1144, 1145-46 (11th Cir. 1993) (arguments not raised until reply brief on appellate review are waived).

Second, Petitioner has not accurately stated the standard of review in this case. As the Eleventh Circuit recognized in

its affirming opinion, Petitioner is not seeking review of the dismissal itself; rather, she is appealing the district court's denial of her motion for a reconsideration of that dismissal. Accordingly, the standard of review employed by the Eleventh Circuit was much more strict and limited.[3] *See, e.g., Villareal v. Braswell Motor Freight Lines, Inc.*, 545 F.2d 978 (5th Cir. 1977) (*per curiam*) (motions under Rule 59 and Rule 60 are "much more limited attack[s]" than a direct appeal of a dismissal).[4] Petitioner does not address this distinction.

As to the merits of Petitioner's argument, the new case law cited by Petitioner is not applicable to the case at bar. The cases cited by Petitioner address dismissals ordered *sua sponte* by the district court for want of prosecution. *See World Thrust*, 41 F.3d at 1455; *Kilgo v. Ricks*, 983 F.2d 189 (11th Cir. 1993); *Mingo v. Sugar Cane Growers Co-op of Florida*, 864 F.2d 101, 102 (11th Cir. 1989) (dismissing cases *sua sponte* for want of prosecution). Here, dismissal was by

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3. Relief under Federal Rule of Civil Procedure 59 or 60 should only be granted in "exceptional circumstances." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (*citing Ackerman v. United States*, 340 U.S. 193, 202 (1950)). As a result, Petitioner must first show a justification so compelling that the district court was required to vacate the order of dismissal. *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977). Petitioner must then show that the Eleventh Circuit abused its discretion in affirming because it did not hold that the district court abused its discretion by not vacating the dismissal. Petitioner cannot meet this onerous burden because she has failed to show "exceptional circumstances" warranting reconsideration at any stage of review.

4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

motion and the concerns presented by a *sua sponte* dismissal — notice, etc. — are not present. *See Solaroll Shade and Shutter Corp., Inc. v. Bio-Energy Systems, Inc.*, 803 F.2d 1130, 1133 (11th Cir. 1986). Even if these cases did apply, the Eleventh Circuit was the proper arena in which to resolve any existing conflict between this case and prior Eleventh Circuit case law. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Further, the Eleventh Circuit specifically stated in its affirmance that although "ordinarily," dismissal is a "sanction of last resort," the district court did not abuse its discretion in this case by denying the motion for reconsideration. In other words, the Eleventh Circuit did consider the possibility of lesser sanctions, but agreed with the district court that a lesser sanction would not have sufficed here.[5] *See Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985) (Eleventh Circuit may find "implicit" in the district court's order that lesser sanctions did not suffice). The Eleventh Circuit, therefore, did not "misapply" its own case law. Rather, Petitioner simply disagrees with the outcome. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("[The Supreme Court] is not the place to . . . reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other").

Finally, Petitioner weakly suggests that the district court's factual finding of "excusable neglect" was incorrect.

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5. Contrary to Petitioner's claim that there was "no discussion or evidence presented to show that Wachovia was greatly prejudiced" (Petition for Writ of Certiorari at 9-10), Respondent has contended at each level of judicial review that it has been prejudiced by Petitioner's failure to follow the Local Rules.

(Petition for Writ of Certiorari at 4-6 & 8.) As outlined amply above, Petitioner failed to follow the Local Rules and failed to respond to Respondent's motion to dismiss. The record directly contradicts Petitioner's claim that the district court did not make a "clear record of delay" or find "wilful contempt." (Appendix C at 6a-7a.) Although Petitioner's counsel attempts to shift blame for these failures to her staff, she has never explained why she herself did not follow the Local Rules. *See Pioneer Investment Services v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380, 397 (1992) (standard for excusable neglect). The Petition is simply the "third bite at the apple" on this topic and should not be considered.

The district court's factual determination that Petitioner willfully violated a succession of Local Rules has survived both district and appellate review. Both a district court and the Eleventh Circuit have determined that Petitioner did not show excusable neglect and that dismissal was an appropriate sanction. These factual findings are correct and should not be disturbed. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."). Certiorari should not be granted here.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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